Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

(3)

No.: 99-1354

In The

Supreme Court of the United States

RED MENDOZA

Petitioner,

v.

BORDEN, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

RON RENZY
Counsel of Record
WENDY S. WALLBERG
WALLBERG & RENZY, P.A.
10100 West Sample Road
Suite 311
Coral Springs, Florida 33065
(954) 757-1212

ERIC SCHNAPPER
University of Washington
School of Law
1100 NE Campus Parkway
Seattle, Washington 98105
(206) 616-3167

FRANK M. MARKS
2710 SW 3rd Avenue
Miami, Florida 33125
(305) 285-1122

Attorneys for Petitioner

13pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

I. THERE IS A CONFLICT AMONG CIRCUITS REGARDING WHETHER A JURY OR APPELLATE JUDGES SHOULD DETERMINE WHETHER SEXUAL CREATED A HOSTILE WORK ENVIRONMENT 2

II. DECISIONS TREATING THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT AS A MATTER OF LAW NECESSARILY -- AND EXPRESSLY — DO SO DECLARING SPECIFIED TYPES OF SEXUAL HARASSMENT TO BE LAWFUL PER SE

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Fuller v. City of Oakland, Cal., 47 F. 2d 1522 (9th Cir. 1995) 3

Gallagher v. Delaney, 139 F. 3d 338, 343 (2d Cir. 1998) . . . 5

Harris [v. Forklift Systems, Inc., 510 U.S. 17 (1993) 9

Hathaway v. Runyon, 132 F. 2d 1214, 1221 (8th Cir. 1997) 5

Howard v. Burns Bros., Inc., 149 F. 3d 835(8th Cir. 1998) . 5

Konstantopoulos v. Westvaco Corp., 112 F. 3d 710 (3d Cir. 1997) 3

McKenzie v. Illinois Dept. of Transp., 92 F. 3d 473, 480 (7th Cir. 1996) 3

Mendoza v. Borden, Inc, 158 F.3d 1171 (11th Cir. 1999) (en banc) 1-9

Reeves v. Sanderson Plumbing, No. 99-536 1

Sprague v. Thorn Americas, Inc., 129 F. 3d 1355 (10th Cir. 1997) 3

Stacy v. Shoney's, Inc., 142 F. 3d 436 (6th Cir. 1998) 3

Webb v. Baxter Healthcare Corp., 57 F. 3d 1067 (4th Cir. 1995) 5

REPLY BRIEF FOR PETITIONER

The respondent advances in its Brief in Opposition an argument similar to that of the respondent in Reeves v. Sanderson Plumbing, No. 99-536--that courts should function as a "gatekeeper" to prevent juries from deciding discrimination cases in which the judges think the employer ought to prevail. Compare Br. Opp. 1, 6 with Brief for Respondent, No. 99-536, p. 22. Both respondents misperceive the respective roles of juries and judges in resolving such factual disputes.

Respondent urges that certiorari is not warranted merely to "reweigh the evidence" which prompted seven of the eleven appellate judges to find that the harassment to which petitioner was subjected did not create a hostile work environment. (Br. Opp. 3). But the central problem posed by the decision below is that the lower court judges themselves should not have weighed the evidence or made such a finding--those were the responsibilities of the jury which heard, but was not permitted to decide, this case.

In improperly usurping the jury's fact finding role in this case, the Eleventh Circuit utilized a methodology somewhat different from that of the Fifth Circuit in Reeves. Here the appellate court applied a sort of common law harassment-rating system, delineating a long list of abusive practices which it held cannot, as a matter of law, support of finding of a discriminatory environment. This is most analogous to the Fifth Circuit rule in Reeves that age-biased remarks, if made several months prior to a disputed discharge, cannot as a matter of law support a finding of discriminatory intent. Both decisions improperly intrude upon the central role of the jury in drawing inferences from such evidence.

I. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A JURY OR APPELLATE JUDGES SHOULD DETERMINE WHETHER SEXUAL HARASSMENT CREATED A HOSTILE WORK ENVIRONMENT

The sharply divided en banc decision in the court below is the most recent and palpable illustration of a widespread and fundamental disagreement among the circuit courts regarding sexual harassment cases. The majority below believed, as several circuits have held, that judges--on appeal, appellate judges--are responsible for determining de novo whether acts of harassment were sufficiently severe and pervasive to create a hostile work environment. The dissenters, on the other hand, emphatically agreed instead with other circuits, which insist to the contrary that such determination is to be made by the trier of fact, which in Title VII cases is usually a jury. This pivotal division about the method for adjudicating harassment cases has had the practical effect of creating starkly different standards of conduct in different circuits

.

Although this case was initially tried to a jury, the jurors were not permitted to decide whether the harassment at issue had in fact created a hostile environment and thus violated Title VII. That task was candidly assumed by seven judges of the Court of Appeals. The en banc majority directed dismissal of petitioner's sexual harassment claim because "we find Mendoza's claim still falls far short of actionable hostile environment sexual harassment." (App. at 21)(Emphasis added). The appellate opinion contains several other such findings.[1] The en banc

---

1. (App. at 17)("the conduct alleged by Mendoza falls well short of the level of either severe or pervasive conduct sufficient to alter Mendoza's terms or conditions of employment."); (App. at 18-19) ("Turning to the heart of this appeal, . . . [judicial precedent] demonstrates that Mendoza did

majority insisted that the evaluation of the evidence of harassment was a quintessential judicial function. "The courts should examine the conduct . . . and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment." (App. at 14)(Emphasis added). It would be judicial error, the majority held, "[w]ere we to conclude that the conduct established by Mendoza was sufficiently severe or pervasive to alter her terms or conditions of employment." (App. at 24)(Emphasis added).

In its insistence that judges--indeed, appellate judges--should determine whether harassment created a hostile work environment, the en banc majority sided with a number of circuits that have expressly adopted that rule. Fuller v. City of Oakland, Cal., 47 F. 2d 1522, 1527 (9th Cir. 1995)("whether the conduct . . . was sufficiently severe or pervasive to constitute sexual harassment is a question of law reviewed de novo"); Stacy v. Shoney's, Inc., 142 F. 3d 436 (6th Cir. 1998), 1998 WL 165139 *3 ("[w]hether misconduct rises to the level of a hostile work environment is a legal question"). In a number of circuits, appellate determinations of this issue are the norm. Sprague v. Thorn Americas, Inc., 129 F. 3d 1355, 1366 (10th Cir. 1997)("Our review of the remarks alleged by [the plaintiff] leads us to conclude that these remarks . . . [did not] create an actionable hostile environment")(emphasis added); Konstantopoulos v. Westvaco Corp., 112 F. 3d 710, 716 (3d Cir. 1997)("[We] conclude based on our own examination of the record, that [the plaintiff] was not subject to a hostile or abusive working environment")(emphasis added); McKenzie v. Illinois

---

not endure conduct that was so severe or pervasive that it altered the terms or conditions of her employment"); --a (App. at 20)(instances of harassment did not "alter the conditions under which Mendoza was required to perform her job.")

Dept. of Transp., 92 F. 3d 473, 480 (7th Cir. 1996)("[W]e cannot hold that the frequency or severity of the comments rose to the level of 'unreasonably interfer[ing] with [plaintiff's] environment")(emphasis added).

In the court below, the four dissenting judges emphatically rejected this doctrine that judges rather than juries are to assess whether harassment created a hostile environment. Judge Barkett insisted that "this is a matter for juries and not judges to decide as a matter of law." (App. at 87-88). "The standard for whether [a hostile] environment exists has been expressly defined--in quintessential jury terms--as an environment that a *reasonable person* would find hostile or abusive." (App. at 71).(emphasis in original) [2] She objected that "the majority has . . . arrogated to itself the jury function in violation of our legal precedent and Title VII's specific entitlement to a jury's verdict." (App. at 91).[3] "The mistrust of juries evidenced by the majority is at odds with the specific directive of Congress that the jury is to decide whether gender discrimination has occurred in the workplace." (App. at 90). "This record in conjunction with the directives of the Supreme Court leads . . . to the conclusion that the question here is one only for the jury." (App. at 70).

Judge Tjoflat also insisted "that it is a jury (traditionally, the finder of fact) and not the court who should be making these determinations." (App. at 51 n.6). Tjoflat objected that the majority had failed to justify its usurpation of the jury's role:

---

2. (App. at 91) ("As in other contexts wherein the jury is charged with applying a 'reasonable man' standard, allowing jurors to decide the question of reasonableness as to Title VII issues is precisely what Congress intended.")

3. (App. at 89)("By making these determinations and drawing these inferences, the majority has usurped the traditional role of the rightful finder of fact.")

"[W]e must take it on faith that judges, and not juries, are the appropriate persons to be deciding what conduct can and cannot be interpreted as sufficiently offensive and harassing." (App. at 57). "Because the inquiry is so fact intensive and contextually specific, . . . Mendoza's allegations certainly meet the threshold of what is required for the case to reach a jury." (App. at 62).

Three circuits agree with the dissenters below that the trier of fact, not appellate judges, should ordinarily determine whether harassment brought about a hostile environment. Webb v. Baxter Healthcare Corp., 57 F. 3d 1067 (4th Cir. 1995), 1995 WL 352485 (whether "harassment is sufficiently severe or pervasive is quintessentially a question of fact"); Hathaway v. Runyon, 132 F. 2d 1214, 1221 (8th Cir. 1997)("There is no bright line between sexual harassment and merely unpleasant conduct so a jury's decision must generally stand unless there is trial error"); Howard v. Burns Bros., Inc., 149 F. 3d 835, 840 (8th Cir. 1998)("whether the conduct rose to the level of abuse is largely in the hands of the jury"); Gallagher v. Delaney, 139 F. 3d 338, 343 (2d Cir. 1998)("a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment.")

The majority's decision to classify as non-actionable the types of harassment which had occurred in the instant case rested on precisely the usurpation of the jury function inherent in the court's insistence that judges rather than juries should decide whether harassment created a hostile environment. Petitioner testified that her supervisor had repeatedly stared at her groin while making loud sniffing sounds. The apparent purpose of this bizarre behavior on Page's part was to imitate the actions of a male dog in heat. The majority, having recognized that under Title VII harassment is actionable if it is "humiliating", breezily announced that "the sniffing sounds are hardly . . . humiliating." (App. at 19). In an amazingly indulgent concurring opinion,

Judge Edmondson refused to believe that these incidents were even sexual in nature. (App. at 32).

Judge Barkett correctly emphasized that whether a reasonable person would regard them as humiliating was, at the least, a jury question.

> Assuming there are reasonable people who, while crediting Mendoza's version of the facts, would not think that staring at a woman's groin area while making sexually suggestive sniffing noises is degrading, humiliating, and/or intimidating, it seems beyond peradventure that many reasonable people would indeed find it to be so.

(App. at 84).

II. DECISIONS TREATING THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT AS A MATTER OF LAW NECESSARILY--AND EXPRESSLY--DO SO BY DECLARING SPECIFIED TYPES OF SEXUAL HARASSMENT TO BE LAWFUL PER SE

The importance of the decision below, and of decisions in the other circuits treating the existence of a hostile environment as a matter of law, reaches far beyond the disposition of particular cases. All of these decisions expressly, and necessarily, use the same methodology in order to arrive at the conclusion that a given pattern of harassment did not create a hostile environment. They do so by holding that certain specified types of sexually harassing conduct cannot as a matter of law create a hostile environment. Such decisions have a profound impact on the substance of Title VII in the circuits involved; the types of sexual harassment thus declared outside the reach of Title VII can be engaged in with impunity by company officials. Thus the decision below is a virtual road map for supervisors and other

employees who want to engage in sexual harassment with legal impunity.

The en banc majority converted the dispute in this case into a legal issue by the device of establishing what it described as "a baseline of actionable conduct." (App. at 24); see also (App. at 10). Under this system certain types of harassing conduct are classified as falling either above or below the baseline. Harassing conduct which falls below the baseline is not "actionable"; it is deemed incapable as a matter of law of creating a hostile environment. The court of appeals, elaborating on this classification system, spelled out a number of types of harassing actions which as a matter of law are never "actionable" in the Eleventh Circuit:

> Staring: "repeated staring at [a plaintiff's] breasts" (App. at 15); "position[ing] a magnifying class over [the plaintiff's] crotch" (App. at 15); "star[ing] at [the plaintiff] in the bathroom" (App. at 15); "looking plaintiff up and down, smiling and stating there's 'Nothing I like more in the morning than sticky buns.'" (App. at 15).
>
> Looking Down Woman's Dress: "attempts to look down the plaintiff's dress" (App. at 15); "look[ing] down [plaintiff's] dress and sa[ying] 'well, you got to get it when you can.'" (App. at 15).
>
> Remarks About Plaintiff's Anatomy: "your elbows are the same color as your nipples" (App. at 14); "comment that plaintiff had big thighs" (App. at 14); "statement that plaintiff had the 'sleekest ass'" (App. at 14).
>
> Gestures: "simulated masturbation" (App. at 16).
>
> Certain Touching: "touching plaintiff's 'breasts with some papers'" (App. at 15); "incidents of touching [plaintiff's] arm, fingers or buttocks" (App. at 15).

> Sexual Remarks: "sexually oriented comments"(App. at 14); "sexual jokes aimed at [plaintiff]"(App. at 15); "'sexually oriented, offensive' statements" (App. at 15); "repeated sexual jokes" (App. at 15).

Having established this classification system, the court below quickly concluded that the harassment inflicted on petitioner was no worse than the other practices which it had rated "not actionable" and thus held that her Title VII claim was properly dismissed. (App. at 17-20). The en banc majority's system for rating sexual harassment techniques is now controlling law throughout the Eleventh Circuit; complaints alleging only "non-actionable" forms of harassment must now be dismissed as a matter of course.

Judge Barkett pointedly recognized that the majority had legalized a whole range of harassing practices, declaring them "categorically exempt from the reach of Title VII." (App. at 80). "At the heart of the majority's opinion is the view that the incidents endured by Mendoza simply weren't that bad, that she should just put up with them rather than bring a Title VII claim." (App. at 86-87). Judge Tjoflat described in similar terms the substantive consequences of the court's holding. "From on high, the majority has determined that female employees should feel no humiliation or anxiety when their bosses sniff in the direction of their groins, touch their hips, and follow them around the office, staring at them in a sexually suggestive manner; but the court never explains why this is the case." (App. at 51 n. 6). "[W]hen we raise the bar as high as the majority does today, it becomes more likely that we will miss the more subtle forms of sex discrimination that may still infest the workplace and make it more difficult for women, especially, to participate on terms of equality with their male counterparts." (App. at 66)

Judge Tjoflat properly recognized that--at least in comparison with other circuits--the majority's opinion "represents a major departure from established sexual harassment law." (App.

at 67). He noted that the handful of cases referred to by the majority as involving "true instances of sexual harassment" involved actions of extraordinary gravity. (App. at 64-65).

> Today's opinion appears to require a plaintiff to make a showing that is beyond that required by any other circuit. I say this because the only cases cited approvingly by the majority involved conduct so outrageous that it would shock the conscience of the court: female employees being held down so that other employees could fondle their breasts and legs . . . physical and verbal abuse that took place on a daily basis . . . and the rubbing of plaintiff's bodies, commenting extensively on their physical attributes, showing them pornographic photos and videotapes, offering them money for sex, and speculating on plaintiff's sexual prowess. Those cases certainly presented hostile working environments, but as a matter of precedent we are far beyond the day when a woman must allege multiple rapes before she can make out a case of sexual harassment. . . . [T]he Court made [that] clear in Harris [v. Forklift Systems, Inc., 510 U.S. 17 (1993).]

(App. at 67-68) Judge Tjoflat emphasized that four circuits had held that constantly following a woman and staring at her body was conduct which could support a sexual harassment claim (App. at 55-56), holdings squarely in conflict with the majority's insistence that such conduct is non-actionable. (App. at 21). "[O]ther circuits", he observed, "have found conduct that is less egregious than that alleged by Mendoza to be sufficiently severe or pervasive to survive a motion for judgment as a matter of law." (App. at 62, See also App. at n. 10). No less importantly, many of the sexual harassment techniques that are now entirely lawful in the Eleventh Circuit could in other circuits provide a basis for a finding of a violation of Title VII.

CONCLUSION

Based on the foregoing reasons, as well as those stated in Petitioner's Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

RON RENZY
Counsel of Record
WENDY S. WALLBERG
WALLBERG & RENZY, P.A.
10100 West Sample Road
Suite 311
Coral Springs, Florida 33065
(954) 757-1212

ERIC SCHNAPPER
University of Washington
School of Law
1100 NE Campus Parkway
Seattle, Washington 98105
(206) 616-3167

FRANK M. MARKS
2710 SW 3rd Avenue
Miami, Florida 33125
(305) 285-1122

Attorneys for Petitioner